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IN THE
COURT OF APPEALS OF INDIANA

JOHN RAY FRIES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A01-0512-CR-569
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY SUPERIOR COURT
The Honorable James B. Morris, Judge
Cause No. 69D01-0311-FD-219

August 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant John Ray Fries ("Fries") challenges the two-year sentence imposed upon him for his conviction of Possession of Marijuana, a Class D felony.[1] We affirm.

Issues

Fries presents three issues for review, which we have consolidated and restated as the following two issues:

I. Whether the trial court abused its sentencing discretion by giving significant weight to Fries' criminal history and ignoring mitigating evidence; and

II. Whether the sentence is inappropriate and should be revised pursuant to Indiana Appellate Rule 7(B).

Facts and Procedural History

On November 9, 2003, Fries and a friend were traveling through Ripley County to Indianapolis after a visit to the Bellterra Casino. An Indiana State Trooper stopped the vehicle for speeding, and detected an odor of marijuana emanating from it. Fries, the passenger, stepped out of the vehicle and the trooper observed a plastic baggy on the seat cushion where Fries had been seated. The baggy contained approximately one-eighth of an ounce of marijuana.

On November 17, 2003, the State charged Fries with possession of marijuana, a Class A misdemeanor, and possession of marijuana, a Class D felony. On June 14, 2005, the trial court conducted a hearing on Fries' motion to suppress, and denied the motion. On July 21,

[1] Ind. Code § 35-48-4-11.

2005, Fries pleaded guilty to possession of marijuana with a prior conviction, a Class D felony, and the State dismissed the misdemeanor possession charge.

On November 16, 2005, the trial court conducted a sentencing hearing. The trial court found that Fries' criminal history was an aggravating circumstance, and that there were no mitigating circumstances. Fries was sentenced to two years imprisonment. He now appeals.

Discussion and Decision

I. Abuse of Discretion in Sentencing

In general, sentencing determinations are within the trial court's discretion. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). Indiana Code Section 35-38-1-7.1(a)(2) provides that a sentencing court may consider the defendant's history of criminal or delinquent behavior. Subsection (b) provides that the court may consider mitigating circumstances. Here, the trial court found no mitigating circumstances, but determined that Fries' criminal history justified six months imprisonment beyond the presumptive or advisory sentence.

Fries argues that the sentencing court abused its discretion by according weight to his history of criminal offenses while ignoring circumstances that Fries claims are mitigating, i.e., his guilty plea, his efforts toward rehabilitation, and hardship from incarceration including the loss of employment and housing.

A. Criminal History

In Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005), the Indiana Supreme Court confronted the issue of whether a defendant's criminal record, standing alone, is a sufficient aggravator to support any enhancement above the presumptive term. In addressing this issue,

the Court recognized that "the question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history." Id. Such "weight is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Id. While acknowledging that, in many instances, "a single aggravator is sufficient to support an enhanced sentence," the Morgan Court cautioned sentencing and appellate judges to think about the appropriate weight to give a history of prior convictions. Id.

Fries has a lengthy criminal history. In 1997, he was convicted of criminal trespass, carrying a handgun without a permit, and resisting law enforcement, all Class A misdemeanors. In 1998 he was convicted of operating a vehicle without having received a license, a Class C misdemeanor, and of criminal trespass, a Class A misdemeanor. In 2000, Fries was convicted of theft, a Class D felony, and of possession of marijuana and driving while suspended, Class A misdemeanors. In 2001, Fries was convicted of operating a vehicle while impaired, driving while suspended, and criminal trespass, all Class A misdemeanors. In 2002, Fries was convicted of false reporting, a Class B misdemeanor, driving while suspended, a Class A misdemeanor, and operating a vehicle while impaired, a Class D felony. In 2005, after his arrest for the present offense but before his sentence for the present offense was imposed, Fries was convicted of operating a vehicle while suspended as a habitual offender. On six occasions, Fries had his probation revoked.

We agree with Fries that the 2000 marijuana conviction could not support the enhancement of his sentence, because it was used to elevate the present marijuana offense to

a Class D felony. See Waldon v. State, 829 N.E.2d 168, 182 (Ind. Ct. App. 2005), trans. denied. However, we are confident that the remaining criminal history would support the six-month enhancement. Thus, assuming that the trial court included the 2000 marijuana conviction in its consideration of Fries' criminal history for purposes of sentencing enhancement, the error is harmless. We may affirm a sentence despite an irregularity, where it amounts to harmless error. Sherwood v. State, 749 N.E.2d 36, 39-40 (Ind. 2001). The trial court did not abuse its discretion in finding Fries' criminal history to have sentencing significance.

B. Mitigating Evidence

The trial court is not obligated to accord the same weight to a factor that the defendant considers mitigating or to find mitigators simply because they are urged by the defendant. Klein v. State, 698 N.E.2d 296, 300 (Ind. 1998). Rather, it is within the trial court's discretion to determine whether mitigating circumstances are significant and what weight to accord to the identified circumstances. Kelly v. State, 719 N.E.2d 391, 395 (Ind. 1999), reh'g denied. Moreover, the trial court is not required to explain why it did not find a certain factor to be significantly mitigating. Dunlop v. State, 724 N.E.2d 592, 594 (Ind. 2000), reh'g denied.

At the sentencing hearing, Fries apologized for his offense, and argued for leniency because he had "got that problem [with alcohol] solved" and because he would lose his job and employer-owned housing if incarcerated. (Tr. 72.) On appeal, he further claims that the trial court should have sua sponte recognized that his guilty plea was a mitigating circumstance.

Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances because it saves judicial resources and spares the victim from a lengthy trial. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004). Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. Id. at 1165.

Here, the record demonstrates that Fries entered a guilty plea after the State had gathered its evidence and defended against Fries' motion to suppress the evidence in a hearing. One charge against Fries was dismissed in exchange for his plea of guilty to the remaining charge. Because the benefit to the State from Fries' guilty plea was marginal, at best, the trial court did not err by failing to conclude, sua sponte, that the plea was a significant mitigating factor.

As to his other claimed mitigators, Fries expressed his belief that he had adequately dealt with his alcohol problem and also opined that his current employer would not hold his job and housing open for him in the event of his incarceration. Nevertheless, Fries did not provide documentation of successful completion of any alcohol treatment program, nor did he explain how a period of incarceration beyond the presumptive or advisory term would result in undue hardship to a dependent. We decline to hold that the sentencing court was required to credit Fries' uncorroborated statements.

Because Fries' claimed mitigators do not have clear evidentiary support in the record, the trial court did not abuse its discretion in failing to accord them sentencing weight.

II. Appropriateness of Sentence

Next, Fries requests our examination of the nature of the offense and character of the offender pursuant to Indiana Appellate Rule 7(B). Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

The nature of the offense is that Fries possessed marijuana in a moving vehicle. The arresting officer detected an odor of marijuana emanating from the vehicle once it stopped. We are not convinced that Fries is entitled to leniency based on the circumstances of the offense.

The character of the offender is that previous attempts at rehabilitation have failed to deter him from criminal activities. His criminal history spans several years and includes fourteen convictions, three of which are for felonies. His probation was revoked on six occasions. After his arrest for the present offense, he committed another offense for which he was subsequently convicted and sentenced.

In light of the nature of the offense and the character of the offender, we do not find Fries' sentence to be inappropriate.

Affirmed.

RILEY, J., and MAY, J., concur.